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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1192

DONALD GOLDSTEIN, RUTH KOVEN, and DONALD KOVEN,

Petitioners,

vs.

STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, the State of California, opposes the Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles and respectfully suggests that no sufficient grounds exist for the granting of that petition because:

1. This case presents no special and important reasons of the character specified in Rule

19 of the Revised Rules of the Supreme Court of the United States;

2. The judgment of the court below, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, is correct; and

3. The legal issue raised by the petition is neither novel nor the subject of improper or conflicting determinations, but has been correctly and uniformly decided contrary to petitioners' contentions by the Courts of Appeals for the Ninth and Tenth Circuits, the courts of California, Illinois, New York and North Carolina, and a Three Judge District Court for the Central District of California, and there is no need for this Court to review that legal issue.

QUESTION PRESENTED

Petitioners do not accurately state the only question which the record in this case

might possibly raise for review by this Court. That question is whether the State of California may proscribe, by its criminal statutes, the piracy[1] of sound recordings fixed prior to February 15, 1972.[2]

1/ Piracy has become the common term to describe the conduct for which petitioners were convicted. See: Shapiro, Bernstein & Co. v. Remington Records, Inc., 265 F.2d 263, 269, 273 (2nd Cir. 1959); Tape Industries Association of America v. Younger, 316 F.Supp. 340, 351 (C.D. Cal. 1970), appeal dism'd., 401 U.S. 902 (1971), appeal pending, U.S. Ct. App. 9th Cir., No. 26,628; Capitol Records, Inc. v. Erickson, 2 Cal.App.3d 526, 528 n.2; 82 Cal.Rptr. 798, 799 n.2 (1969), cert. denied, 398 U.S. 960 (1970); Capitol Records, Inc. v. Spies, 264 N.E.2d 874, 877 (Ill.App. 1970); Liberty/UA, Inc. v. Eastern Tape Corp., 11 N.C.App. 20, 180 S.E.2d 414, 416-18, appeal dism'd., 287 N.C. 702, 181 S.E.2d 600 (1971); Note "Piracy On Records" 5 Stan.L.Rev., 433 (1953).

2/ The date on which sound recordings became eligible for the limited copyright protection established by Public Law 92-140, 85 Stat. 391 (1971)

Petitioners have attempted to "load the question" by stating that the California statute making record piracy a crime grants "copyright protection',[3/] and by calling that statute "the California copyright statute",[4/] which prevents "copying" of sound recordings in the "public domain".[5/] But these epithets do not properly characterize the California statute or the conduct which that statute prohibits. As respondent shall demonstrate in this brief, that statute is in no sense a "copyright statute" and does not grant "copyright protection" or prohibit the "copying" of anything, particularly anything in the "public domain". That statute has been aptly characterized as "a larceny statute or an un[f]air [sic] competition law.[6/]

3/ Petition at 2.

4/ Petition at 5 and 8.

5/ Petition at 2, 5 and 8, n. 4d.

6/ Tape Industries Association of America v. Younger, supra, n. 1, 316 F.Supp. at 351.

STATUTES INVOLVED

This case involves the following statutory provisions:

1. California Penal Code §653h (West 1970), which is set out verbatim in Appendix A;

2. Section 2 of the Copyright Act, 17 U.S.C. §2 (1970), which is set out verbatim in Appendix B; and

3. Public Law 92-140, 85 Stat. 391 (1971), which is set out verbatim in Appendix C.

STATEMENT OF THE CASE

Petitioners are admitted tape pirates and record pirates.[7/] Petitioners' business is the mass duplication of phonograph records, the labelling of such duplicates with the titles of the records from which they are made, and the commercial sale for profit of those duplicates. On June 28, 1971, petitioners were convicted, upon pleas of nolo contendere, of ten counts of violating §653h of the California Penal Code. Petitioners concede that petitioner Donald

7/ See cases cited at note 1, supra.

Koven is one of the plaintiffs in Tape Industries Association of America v. Younger, 316 F.Supp. 340 (C.D. Cal. 1970), appeal dism'd., 401 U.S. 902 (1971), appeal pending, U.S. Ct. App. 9th Cir., No. 26,628 (hereinafter referred to as "TIAA v. Younger").[8/] Koven's "business", which led to his conviction for violating §653h, is described by the district court's opinion in TIAA v. Younger as follows:

> "Plaintiffs Pressman, Koven, Holmquist and Holmquist are in the business of making and selling sound tapes and cartridges. These plaintiffs purchase on the open market longplaying disc phonograph records which have been manufactured and sold through the usual commercial channels by record companies. Such disc phonograph records are generally referred to as albums and they usually contain 10 to 12 performances of one artist or group of artists. A label containing the

8/ Petition at 10, n. 5.

title or name of the album, the name of the record company, is affixed to each of the albums and the packages in which they are sold.

After purchasing an album, plaintiffs Pressman, Koven, Holmquist, and Holmquist make a tape recording of the exact sounds recorded on the album. The tape is made by playing the album on a record player connected to a tape recorder which turns out a tape. When this master tape is finished, it is placed on a machine known as a 'tape playback deck'. The 'tape playback deck' is connected to machines known as 'tape slaves' which in turn make additional tape recordings of the sounds which have been transferred from the record album to the master tape. A large number of 'tape slaves' may be connected to one 'tape playback deck' so that a correspondingly large number of tape recordings can be made at

one time. After the tapes have been made by use of the 'tape playback deck' and the 'tape slaves', each of the new tapes is placed on a hub. Each hub is placed into a plastic cartridge, and the ends of the tape are spliced together so that it forms a continuous 'loop' in the cartridge. The cartridge is sealed, tested, packages, and labeled." 613 F. Supp. at 342-43.

The record in this case, which is contained in an engrossed statement on appeal, contains the testimony of two former employees of petitioners, Celeste Lorraine Aviles and Josephine Joy Friedland. They described in detail the means by which petitioners pirated prerecorded stereophonic tapes which had been manufactured and sold by commercial record companies, by manufacturing and widely distributing throughout the United States substantial quantities of pirated tapes. The testimony of Miss Aviles and Miss Friedland, as set forth in the Affidavit in Support of and Petition for Search Warrant, which is contained in

Exhibit "2" to the Engrossed Statement on Appeal, is set out verbatim in Appendix D.

SUMMARY OF RESPONDENT'S ARGUMENT

Petitioners were convicted of violating the California statute by pirating recordings which were fixed prior to February 15, 1972 and which are thus ineligible for the limited copyright protection granted by §1 of Public Law 92-140, 85 Stat. 391 (1971). It has long been the law that the sale of such phonograph records does not dedicate to the public the right to duplicate the recorded performances embodies or fixed in the records. Accordingly, an unbroken line of cases has held that the unauthorized piracy or appropriation of performances, including recorded performances, is unlawful and that neither the copyright clause of the Constitution nor the Copyright Act abrogates the power of the states to protect performances against such theft. This result is perfectly consistent with the Copyright Act, which, in §2,[8a/] expressly recognizes and permits common law rights in "unpublished" works.

8a/ 17 U.S.C. §2 (1970).

The decisions of this Court in Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) and Compco Corp. v. Day-Brite Lighting Inc., 376 U.S. 234 (1964) do not require reversal of the decision below and the consequent overruling of the many decisions which have held unlawful the piracy of sound recordings fixed prior to February 15, 1972. Sears and Compco involved the right to imitate or simulate mechanical devices which could not qualify for patent protection. Those cases do not pertain to the issues raised by this petition, first, because the California statute does not purport to prohibit the imitation or simulation of recorded performances embodied on phonograph records, and second, because Congress has, in §2 of the Copyright Act, unlike the Patent Act, expressly provided that there may be common law protection of unpublished "works."

Additionally, in §3 of Public Law 92-140, 85 Stat. at 392 (1971) Congress expressly recognized that "rights" may exist in sound recordings fixed prior to the availability of federal copyright protection for sound recordings, and expressly provided that "nothing in Title 17, United States

Code, as amended by section 1 of this Act, shall be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before the effective date of this Act."

ARGUMENT

I

RECORDED PERFORMANCES FIXED PRIOR TO FEBRUARY 15, 1972 ARE NOW AND ALWAYS HAVE BEEN PROTECTABLE UNDER STATE LAW.

The unauthorized duplicating or pirating of both live and recorded performances has been condemned by a long line of decisions of the federal and state courts, which have held unlawful and granted injunctions to prohibit the appropriation of performances: "off the air", Columbia Broadcasting System, Inc. v. Documentaries Unlimited, Inc., 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup.Ct. 1964) (News reports); Metropolitan Opera Ass'n., Inc. v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), aff'd., 279 App.Div. 632, 107 N.Y.S.2d 795 (1951) (opera broadcast); from

other "master recordings", Capitol Records, Inc. v. Mercury Record Corp., 109 F.Supp. 330 (S.D. N.Y. 1952), aff'd., 221 F.2d 657 (2d Cir. 1955), RCA v. Premier Albums, Inc., 19 App. Div. 2d 62, 240 N.Y.S.2d 995 (1963); or from phonograph records sold to the public, Capitol Records, Inc. v. Greatest Records, Inc., 43 Misc. 2d 878, 252 N.Y.S.2d 553 (Sup.Ct. 1964); Capitol Records, Inc. v. Erickson, 2 Cal.App.3d 526, 82 Cal.Rptr. 798 (1969), cert. denied, 398 U.S. 960 (1970); Capitol Records, Inc. v. Spies, 264 N.E.2d 874 (Ill. App. 1970); Liberty/UA, Inc. v. Eastern Tape Corp., 11 N.C. App.20, 180 S.E. 2d 414, appeal dism'd., 278 N.C. 702, 181 S.E.2d 600 (1971). See Gieseking v. Urania Records, Inc., 17 Misc.2d 1034, 155 N.Y.S.2d 171 (Sup. Ct. 1956).

The Federal Trade Commission, as early as 1919, held that the unauthorized duplication of piano rolls constituted appropriation of the ingenuity, labor and expense of the originator and was an unfair method of competition under §5 of the Trade Commission Act. Orient Music Roll Co., 2 F.T.C. 176 (1919).

II

THE SEARS AND COMPCO DECISIONS DO NOT SANCTION RECORD PIRACY.

A. Neither the Holdings nor the Reasoning of Sears and Compco Apply to or Sanction Record Piracy.

The California statute prohibits record piracy, which is the unauthorized duplication of phonograph records. That statute does not restrict in any way the playing of phonograph records, or the imitation or simulation of the performances embodied in those records. Petitioners argue that the decisions of this Court in Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) and Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964) "[a]re Dispositive of the Question of the Constitutionality" of the California statute.[9/] The facts and holdings of Sears and Compco pertain only to the right to "copy" mechanical items which are not protected by a patent and are "in the

[9/] Petition at 10.

public domain". Thus, in order for the reasoning of Sears and Compco to be construed to permit pirates to duplicate phonograph records, the owners of the recorded performances embodied in those records must have done some act which dedicates to the public the right to duplicate those recorded performances and sell such duplicates commercially for profit; and, if there has been such an act, petitioners' pirated tapes must be "copies" of the records from which they were duplicated in the same sense that the pole lamp made by Sears and the lighting fixture made by Compco were "copies" of the lamp and fixture which they imitated. But neither of these facts exist with respect to pirated tapes, and therefore, Sears and Compco are not at all in point here.

(i) The Sale of Phonograph Records Does Not Dedicate to the Public the Right to Duplicate Those Records.

Petitioners claim that the sale of phonograph records is an act which dedicates to the public the right to duplicate those recorded performances. But the numerous

decisions cited above have expressly held that the sale of phonograph records to the public does not "constitute a dedication of the right to copy and sell the records." Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657, 663 (2d Cir. 1955).

A phonograph record is simply a means of rendering a performance audible to a large audience. That the sale of phonograph records is not a "publication" and does not place the recorded performance in the "public domain" and dedicate the right to duplicate that performance for profit, is simply the logical result of the settled rule that the rendition of a public performance, no matter how great or extensive the audience, does not constitute a publication or dedication by the owner of the right to duplicate the performance. See Ferris v. Frohman, 223 U.S. 424 (1912), holding that public performance of a play does not constitute a publication or dedication of the play and does not deprive the owner of his common law rights in the play; Uproar Co.v. National Broadcasting Co., 8 F.Supp. 358, 362 (D.Mass. 1934), modified and aff'd., 81 F.2d 373 (1st Cir.

1936), holding that a radio broadcast does not dedicate the performance to the public at large or divest the owner of the performance of his rights thereto; King v. Mister Maestro, Inc., 224 F.Supp. 101 (S.D. N.Y. 1963), holding the public delivery of a speech to an "enormous crowd" accompanied and followed by radio and television broadcasts and rebroadcasts and the exhibition of movie newsreels of that speech is not a general publication which divests the owner of the speech of his rights in it and that, accordingly, phonograph records cannot be made of the speech without the owner's consent.

(ii) Pirated Tapes are not "Copies" of the Recorded Performances Embodied on Phonograph Records in the Same Sense that the Pole Lamp and Lighting Fixture Involved in Sears and Compco were "Copies" of the Lamp Fixture They Imitated.

One of the fundamental errors of petitioners' argument is the premise that petitioners' pirated tapes are "copies" of

the phonograph records and prerecorded tapes from which those pirated tapes are duplicated in the same sense that the pole lamp involved in Sears and the lighting fixture involved in Compco were "copies", i.e., imitations or simulations, of another pole lamp and another lighting fixture.[10/]

10/ Petitioners' arguments are based on the unstated and false premise that the word "copy" has one immutable inherent meaning without regard to the conduct and circumstances involved. But words do not have such rigidly fixed meanings, as pointed out in the opinion of Chief Justice Traynor in Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co., Inc., 69 Cal. 2d 33, 38, 69 Cal.Rptr. 561, 564-65, 442 P.2d 641, 644-45 (1968):

> "Words, . . . do not have absolute and constant referents. 'A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry. . .' The meaning of particular words or groups of words varies with the '. . .verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). . . . A word has no meaning apart from these factors; must less does it have an objective meaning, one true meaning.'" (citations of

(continued)

But pirated tapes are not imitations or simulations at all of the only thing -- the recorded performance -- that makes a phonograph record valuable and saleable. When a pirated tape is played, the listener hears the one and same recorded performance he hears when the phonograph record or prerecorded tape from which the pirated tape has been duplicated is played. Petitioners thus do not sell "copies" of recorded performances in the same sense that Sears, Roebuck sold "copies" of the Stiffel pole lamp; petitioners sell the original recorded performance.

The pirated tapes which petitioners and all other tape pirates make and sell have value and are saleable only because petitioners and all other tape pirates label

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10/ (continued)

authorities omitted). The word "copy" may have many different meanings. See White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1 (1908).

their pirated tapes with the name of the artist and the title of the album duplicated,[11/] so that the public knows that when it is purchasing a pirated tape it is purchasing a means of hearing the original recorded performance by the original performer just as it would hear that performance on the phonograph record album from which the tape has been duplicated, and not on a "copy" or "imitation" of that original performance. Petitioners are able to sell this original performance because a phonograph record can be used not only as a means of causing a recorded performance to become audible, but also, with modern electronic technology, as a "die" for inexpensively reproducing and duplicating that performance.

Proof of the proposition that Sears and Compco do not sanction piracy is precisely that in order for the pirated tapes to be

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11/ See the testimony of Miss Friedland in Appendix D, and Capitol Records, Inc. v. Erickson, supra, 2 Cal.App.3d at 537, 82 Cal.Rptr. at 805-806.

saleable, petitioners must and do inform the public that the pirated tapes petitioners sell contain and are the means of hearing the original performances embodied in the records from which those tapes have been duplicated. Petitioners so inform the public by labeling their pirated tapes with the title of the pirated record album and the name of the performer whose performance is embodied in that album.[12/] Certainly an

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[12/] Petitioners thereby commit two additional separate torts: unfair competition by appropriating the title of the recorded performance, Jackson v. Universal International Pictures, Inc., 36 Cal.2d 116, 222 P.2d 433 (1950); and unfair competition by using the names of performers for commercial purposes in violation of the rights of the record company which has by contract acquired that right in connection with the sale of phonograph records, Fairfield v. American Photocopy Equipment Co., 138 Cal.App.2d 82, 291 P.2d 194 (1955); Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953), cert. denied, 346 U.S. 816 (1953); Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3rd Cir. 1956), cert. denied, 351 U.S. 926 (1956). See Capitol Records, Inc. v. Erickson, supra, 2 Cal.App.3d at 538, 82 Cal.Rptr. at 806.

unlabelled cartridge of prerecorded tape, or a cartridge of prerecorded tape labelled a "song" performed by "some singers" is not nearly as desirable or saleable as a cartridge labelled with the title of a "hit" record album and the name of a famous performer. This demonstrates that petitioners have not "copied" in the same sense that Sears and Compco "copied" - by imitating and simulating the product and selling that product under their own names - but that petitioners have in fact appropriated valuable recorded performances and sold those appropriated performances under the same name as the original.

(iii) Sears and Compco Do Not Support Petitioners' Claim that Federal Law Has Preempted the Power of the Courts to Proscribe Record Piracy.

Petitioners argue in effect that Sears and Compco announced a broad general doctrine of federal preemption which abrogated the power of the states to proscribe record piracy and tape piracy[13/]

13/ Petition at 6 and 10-16.

and by implication overruled the numerous prior cases holding that record piracy is unlawful. Sears and Compco do not so hold, expressly or by implication; the identical argument of "general preemption" which petitioners make here has been made to many federal and state courts and has been expressly rejected by every court which has considered it, most recently by the Court of Appeals for the Ninth Circuit in Duchess Music Corp. v. Stern,[14/] and by the Court of Appeals for the Tenth Circuit in Tape Head Co. v. RCA Corp., 452 F.2d 816, 819 n. 1 (10th Cir. 1971), and by the appellate courts of California, Illinois and North Carolina in Capitol Records, Inc. v. Erickson, 2 Cal.App.3d 526, 82 Cal Rptr. 798, (1969), cert. denied, 398 U.S. 960 (1970); Capitol Records, Inc. v. Spies, 264 N.E.2d 874, 877 (Ill. App. 1970); Liberty/UA, Inc. v. Eastern Tape Corp., 11

14/ Court of Appeals for the Ninth Circuit No. 71-1854, decided March 13, 1972, reversing 331 F.Supp. 127 (D. Ariz. 1971). (The opinion of the Court of Appeals has not yet been published.)

N.C. App. 20, 180 S.E.2d 414, 417, appeal dism'd., 287 N.C. 702, 181 S.E.2d 600 (1971). Shortly after Sears and Compco were decided by this Court, this argument was rejected by the New York courts in Columbia Broadcasting System, Inc. v. Documentaries Unlimited, Inc., 42 Misc.2d 723, 726-767, 248 N.Y.S.2d 809, 812-813 (Sup. Ct. 1964) and Capitol Records, Inc. v. Greatest Records, Inc., 43 Misc.2d 878, 525 N.Y.S.2d 553, 555-557 (Sup.Ct. 1964).

Respondent recognizes that these federal and state court decisions are, of course, not binding on this Court. Respondent believes, however, that the reasoning of these decisions is most persuasive and that their interpretation of Sears and Compco is correct.

B. The Other Cases Cited by Petitioners Are Not In Point.

Petitioners have not cited one case which holds expressly or by implication that the sale of phonograph records dedicates to the public the right to duplicate and thereby appropriate the performances

embodied in those records and to sell such duplicates commercially for profit. Insofar as counsel for respondent have been able to ascertain, there is no reported decision of any court which has held that the commercial piracy in which petitioners engage is lawful.

Cases such as G. Ricordi and Co. v. Haendler, 194 F.2d 914 (2nd Cir. 1952), dealing with the copying of a printed work which had been copyrighted but on which the copyright had expired, and State's Attorney v. Sekuler, 249 Md. 499, 240 A.2d 608 (1968), dealing with copying a map which could have been, but was not copyrighted, are plainly irrelevant to the question of the legality of the duplication of phonograph records fixed prior to February 15, 1972 - because such records embody performances, the rights to which are not lost by rendition of the performance; and because an unbroken line of federal and state cases have recognized that the sale of phonograph records does not grant the purchaser of a single record the right to duplicate that record and sell the duplicates commercially for profit. (G. Ricordi and Co. v. Haendler, supra, can

hardly be authority that record piracy is legal for that case was decided by the Court of Appeals for the Second Circuit prior to that court's opinion in Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2nd Cir. 1955), which expressly held that the sale of records does not dedicate to the public the right to duplicate those records and that the unauthorized duplication of a master recording is unlawful.)

Columbia Broadcasting System, Inc. v. DeCosta, 377 F.2d 315 (1st Cir.), cert. denied, 389 U.S. 1007 (1967) is in no way apposite here. In that case DeCosta claimed that the leading character of Paladin in CBS's television series "Have Gun, Will Travel", was copied from a character which DeCosta created and portrayed in live appearances. CBS's alleged conduct was, if true, the "imitation" of a character conceived by plaintiff. DeCosta did not involve duplication or conduct by which the defendant held out that its character "Paladin" was the "original DeCosta", or "the original Paladin created by DeCosta", as petitioners here hold out that their

pirated tapes contain the original performances by the original performers.

Fashion Originators Guild v. Federal Trade Comm., 114 F.2d 80 (2nd Cir. 1940), aff'd. 312 U.S. 457 (1941) is not authority for the proposition that after the sale of a phonograph record, federal law deprives the states of the power to prohibit the unauthorized duplication of the record. This Court did not adopt the reasoning of the Court of Appeals that, as a matter of federal law, the sale of dresses was a publication of the designs which brought them into the "public demesne", so that those designs might be copied with impunity. Rather, this Court held that whether "systematic copying of dress designs is itself tortious. . . is a question of state law. . . ." 312 U.S. at 468. (Emphasis added.)

The other cases cited by petitioners are equally inapposite and unsupportive of petitioners' contentions.

III

THE CALIFORNIA STATUTE IS NOT A COPYRIGHT STATUTE AND IS A LEGITIMATE EXERCISE OF STATE POLICE POWER.

Since Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834) this Court has consistently recognized the availability of common law protection, necessarily of unlimited duration, under state law, for unpublished works which, if published, would have to be protected exclusively under the Copyright Act. See also Little v. Hall, 59 U.S. (18 How.) 165 (1856) and Paige v. Banks, 80 U.S. (13 Wall.) 608 (1872). The Copyright Act expressly reserves to the states the jurisdiction and power to protect sugh rights under what has come to be known as "common law copyright". 17 U.S.C. §2 (1970).

Sears and Compco did not hold, either expressly or by implication, that the sale of phonograph records is a "publication" of those records so that the owners of the recorded performances lose their common law rights to prohibit duplication and appropriation of these performances. There is nothing in Sears and Compco, or in the

policy underlying those cases, which requires this Court to disregard and in effect overrule the many cases decided both before and after Sears and Compco, which have held that the sale of phonograph records does not dedicate to the public the right to duplicate the records and thereby appropriate and sell the very recorded performances embodied on those records. The Court of Appeals for the Second Circuit, in Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657, 663 (2nd Cir. 1955), and numerous state courts which have condemned record piracy have held that the legality of piracy is to be determined by state law. This is perfectly consistent with §2 of the Copyright Act and with Sears and Compco, and with other decisions of this Court, such as Ferris v. Frohman, 223 U.S. 424 (1912), and Fashion Originator's Guild v. Federal Trade Comm., 312 U.S. 457 (1941).

The gist of petitioners' claim is that Sears and Compco require a choice between only two alternatives: protection under a federal statute, or no protection at all. But this claim fails to recognize that the facts and holdings of Sears and Compco

dealt with patent interests, where Congress has indeed prescribed that alternative, but that record and tape piracy involve what are essentially copyright interests, where Congress has expressly provided a third alternative in §2 of the Copyright Act -- common law protection by the states for "unpublished works".

In Sears, the Stiffel Co. had obtained both design and mechanical patents for its pole lamp, and the trial court had invalidated those patents. Under the Patent Act, there was only one result possible -- no legal protection against the copying of the product. Similarly, in Compco, the Day-Brite Corp. had sought both mechanical and design patents, and was refused a mechanical patent and granted a design patent, and the trial court held the design patent invalid. Again, only one result was possible -- no legal protection against copying of the product.

There is no equivalent of 17 U.S.C. §2 in the Patent Act. For this reason alone, the holdings of Sears and Compco, which deal with the results of the sale of mechanical devices which were either

unpatented or for which patents were invalidated, are not relevant to this case, which does not deal with anything which is an "invention" subject to being patented.

It is apparent that upon analysis, petitioners' arguments reduce to the assertion that Sears and Compco have by implication overruled Ferris v. Frohman, reversed many decisions of the lower federal courts and the state courts, and repealed §2 of the Copyright Act. This assertion is untenable. This Court in Sears, expressly recognized the existence and availability of common law state protection under §2 of the Copyright Act, 376 U.S. at 231, n. 7, and, the Court of Appeals for the Ninth Circuit, in Cable Vision, Inc. v. KUTV, Inc., 335 F.2d 348, 351 (9th Cir. 1964), cert. denied, 379 U.S. 989 (1965), recognized that state actions "based upon common law copyright" survive after Sears.

IV

COMPELLING REASONS OF POLICY AND FAIRNESS SUPPORT THE RIGHT OF THE STATES TO PROTECT SOUND RECORDINGS FIXED PRIOR TO THE AVAILABILITY OF FEDERAL PROTECTION.

There is no merit or substance whatever to petitioners' claim that §653h of the California Penal Code has created a "monopoly" in favor of record companies.[15] There are at least 900 legitimate commercial record companies operating in the United States.[16] Under existing law any one of those companies or anyone else who is willing to incur the expense and take the risk may hire arrangers, performers, musicians and other necessary artists, engineers and technicians and produce a recorded performance of a musical

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[15] Petition at 15.

[16] TIAA v. Younger, supra, 316 F.Supp. at 343.

composition -- even one which "sounds just like" another recorded performance of that musical composition.[17/] For this reason the prohibition of record and tape piracy -- the unauthorized duplication and sale of a recording produced, manufactured and sold by someone else-- does not in any way further monopoly or restrict competition. Both the Senate Judiciary Committee and the House Judiciary Committee clearly recognized this fact in rejecting the argument of certain pirates that phonograph records should be subject to compulsory licensing provisions similar to the compulsory licensing provisions for copyrighted musical compositions established by §1(e) of the Copyright Act. See Senate Report No. 92-72, 92d Cong. 1st Sess. (1971) at 6 and House Report No. 92-487, 42d Cong., 1st Sess. (1971) at 4-5.

17/ This is the principle of Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970), cert. denied, 402 U.S. 906 (1971); and Davis v. Trans World Airlines, 297 F.Supp. 1145 (C.D. Cal. 1969). See S. Rep. No. 92-72, 92d Cong., 1st Sess. (1971) at 6; Cong. Rec. 5940, Col.2 (Daily ed., Apr. 29, 1971)

Indeed, record and tape piracy are fundamentally anti-competitive, as recognize by Barbara A. Ringer, Assistant Register of Copyrights, in her testimony in favor of the passage of Public Law 92-140 before Sub-committee No. 3 of the Committee on the Judiciary of the House of Representatives:

> "The record industry, taken as a whole is a highly competitive industry. There is ease of entry; there are a lot of small companies.
>
> "If someone can come in, and legally skim off the hits, who is going to suffer, the small company or the large company? And if it is the small company that suffers from the lack of Federal legislation, then it would seem to me that the effect of the bill would be to promote competition rather than monopoly." Hearings on S.646 and H.R. 6927 before Subcommittee No. 3 of the House Committee on the Judiciary, 92d Cong., 1st Sess. (1971) at 20.

The disastrous impact which record and tape piracy are having on the legitimate

record industry, on performers, musicians, and other persons who earn their livelihoods from the sale of phonograph records and legitimate tapes, and on the federal and state governments, which are losing revenue on account of the activities of the pirates, was cogently detailed in the Reports of the Senate Judiciary Committee and House Judiciary Committee on Public Law 92-140.

> ". . . While it is difficult to establish the exact volume or dollar value of current piracy activity, it is estimated by reliable trade sources that the annual volume of such piracy is now in excess of $100 million. It has been estimated that legitimate prerecorded tapes sales have an annual value of approximately $300 million. The pirating of records and tapes is not only depriving legitimate manufacturers of substantial income, but of equal importance is denying performing artists and musicians of royalties and

contributions to pension and welfare fund and Federal and State governments are losing tax revenues." S.Rep. No. 92-72, 92d Cong. 1st Sess. (1971) at 3-4. See H.R.Rep. No. 92-487, 92d Cong. 1st Sess. (1971) at 2.

The disastrous impact of record piracy on all segments of the legitimate music industry was reiterated in the hearings on S. 646 (which became Public Law 92-140) before Subcommittee No. 3 of the House Judiciary Committee by the testimony of Representative Celler, Chairman of the House Judiciary Committee;[18] Representative Fulton of Tennessee;[19] Bruce Ladd, Jr., Deputy Assistant Secretary for Commercial Affairs and Business Activities for

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[18] Hearings on S. 646 and H.R. 6927 before Subcommittee No. 3 of the House Committee on the Judiciary, 92d Cong., 1st Sess. (1971) at 4.

[19] Id. at 6.

the Department of State;[20] Miss Ringer;[21] and many representatives of all segments of the music industry.[22]

Indeed the magnitude of the problem being created is shown by the fact that petitioners have the audacity to argue that their illegal and immoral business has now become so large that this bigness somehow entitles it to protection.[23] It would be just as logical for heroin peddlers to argue that because their take amounts to hundreds of millions of dollars, laws against dope peddling should not be enforced.

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[20] Id. at 7.

[21] Id. at 10.

[22] See, e.g., id. at 41.

[23] Petition at 7 and 8.

V

CONGRESS HAS EXPRESSLY MANIFESTED AN INTENTION TO PERMIT STATE REMEDIES FOR THE UNAUTHORIZED DUPLICATION OF PHONOGRAPH RECORDS WHICH WERE FIXED PRIOR TO FEBRUARY 15, 1972.

Both the record piracy for which petitioners were convicted and petitioners' conviction occurred prior to the enactment of Public Law 92-140, 85 Stat. 391 (1971), which was signed by the President on October 15, 1971. Section 1 of that Act creates for the first time a limited copyright in sound recordings, which, under §3 of the Act, becomes effective only with respect to sound recordings "fixed, published, and copyrighted" on or after February 15, 1972. Section 3 then provides:

> "nothing in Title 17, United States Code, as amended by Section 1 of this Act, shall be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before the effective date of this Act."

Section 3 of Public Law 92-140 is, therefore, recognition by Congress that there are "rights with respect to sound recordings fixed before the effective date of [that] Act" and that nothing in the Copyright Act (Title 17, United States Code) shall be construed as affecting "in any way any rights" with respect to sound recordings fixed before that effective date -- February 15, 1972. It is important to note that because of this amendment to the Copyright Act there will now be two kinds of phonograph records: those fixed prior to February 15, 1972, which will for all time be uncopyrighted and uncopyrightable, and by express authorization of Congress, protectable under state law; and recordings fixed and sold on and after February 15, 1972, which will be copyrightable and protectable under the Copyright Act.

By §3 of Public Law 92-140 Congress has expressly confirmed, indeed, invited, state protection of sound recordings fixed prior to February 15, 1972. If this Court holds the California anti-record piracy statute unconstitutional, record companies, recording artists and all of the other

persons who earn their livelihood from income generated by the sale of phonograph records will be permanently deprived of any protection for the pre-February 15, 1972 catalogue of records, even though Congress has expressly decreed that legitimate record companies, recording artists and all others shall continue to have whatever protection is now afforded by state law for that pre-February 15, 1972 catalogue.

CONCLUSION

There are no considerations of federal law or policy which support adoption of petitioners' arguments or the abrogation of the power of the states to proscribe the piracy of records and tapes manufactured prior to the availability of federal copyright protection. To the contrary, important considerations of federal law and policy, as well as morality and simple justice, compellingly argue in favor of the existence of such state power.

Petitioners have not shown any of the "special and important reasons" which this Court has generally required for the issuance of a writ of certiorari. The

decision of the court below does not conflict with any important federal policy or with the decision of any federal court or any other state court. To the contrary, the judgment of the court below is consistent with all pertinent precedent. For all these reasons respondent respectfully urges that the petition for writ of certiorari be denied.

Respectfully submitted,

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Attorneys for Respondent
STATE OF CALIFORNIA

§ 653h. Transfer of recorded sounds for unlawful use; sale

(a) Every person is guilty of a misdemeanor who:

(1) Knowingly and willfully transfers or causes to be transferred any sounds recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, with intent to sell or cause to be sold, or to use or cause to be used for profit through public performance, such article on which such sounds are so transferred, without the consent of the owner.

(2) Sells any such article with the knowledge that the sounds thereon have been so transferred without the consent of the owner.

(b) As used in this section, "person" means any individual, partnership, corporation or association; and "owner" means the person who owns the master phonograph record, master disc, master tape, master film or other device used for reproducing recorded sounds on phonograph records, discs, tapes, films or other articles on which sound is recorded, and from which the transferred recorded sounds are directly or indirectly derived.

(c) This section shall neither enlarge nor diminish the right of parties in private litigation.

(d) This section does not apply to any person engaged in radio or television broadcasting who transfers, or causes to be transferred, any such sounds (other than from the sound track of a motion picture) intended for, or in connection with, broadcast transmission or related uses, or for archival purposes.

§ 2. Rights of author or proprietor of unpublished work.

Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor. (July 30, 1947, ch. 391, 61 Stat. 654.)

APPENDIX B

Public Law 92-140
92nd Congress, S. 646
October 15, 1971

An Act

To amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 17 of the United States Code is amended in the following respects:

Sound recordings, Copyright, Limitations. 61 Stat. 652; 66 Stat. 752.

(a) In section 1, title 17, of the United States Code, add a subsection (f) to read:

"To reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording: *Provided*, That the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: *Provided further*, That this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; or to reproductions made by transmitting organizations exclusively for their own use."

(b) In section 5, title 17, of the United States Code, add a subsection (n) to read:

"Sound recordings."

(c) In section 19, title 17, of the United States Code, add the following at the end of the section: "In the case of reproductions of works specified in subsection (n) of section 5 of this title, the notice shall consist of the symbol Ⓟ (the letter P in a circle), the year of first publication of the sound recording, and the name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner: *Provided*, That if the producer of the sound recording is named on the labels or containers of the reproduction, and if no other name appears in conjunction with the notice, his name shall be considered a part of the notice."

Copyright notice, form. 68 Stat. 1032.

(d) In section 20, title 17, of the United States Code, amend the first sentence to read: "The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music, or if a sound recording on the surface of reproductions thereof or on the label or container in such manner and location as to give reasonable notice of the claim of copyright."

Notice, location.

(e) In section 26, title 17, of the United States Code, add the following at the end of the section: "For the purposes of this section and sections 10, 11, 13, 14, 21, 101, 106, 109, 209, 215, but not for any other purpose, a reproduction of a work described in subsection 5(n) shall be considered to be a copy thereof. 'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture. 'Reproductions of sound recordings' are material objects in which sounds other than those accompanying a motion picture are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, and include the 'parts

Definitions.

Supra.

of instruments serving to reproduce mechanically the musical work', 'mechanical reproductions', and 'interchangeable parts, such as discs or tapes for use in mechanical music-producing machines' referred to in sections 1(e) and 101(e) of this title."

61 Stat. 652. 17 USC 1. Infra.

SEC. 2. That title 17 of the United States Code is further amended in the following respect:

Copyrighted music, unauthorized use. 61 Stat. 661.

In section 101, title 17 of the United States Code, delete subsection (e) in its entirety and substitute the following:

"(e) INTERCHANGEABLE PARTS FOR USE IN MECHANICAL MUSIC-PRODUCING MACHINES.—Interchangeable parts, such as discs or tapes for use in mechanical music-producing machines adapted to reproduce copyrighted musical works, shall be considered copies of the copyrighted musical works which they serve to reproduce mechanically for the purposes of this section 101 and sections 106 and 109 of this title, and the unauthorized manufacture, use, or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104 of this title. Whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice."

Notice.

Effective dates.

SEC. 3. This Act shall take effect four months after its enactment except that section 2 of this Act shall take effect immediately upon its enactment. The provisions of title 17, United States Code, as amended by section 1 of this Act, shall apply only to sound recordings fixed, published, and copyrighted on and after the effective date of this Act and before January 1, 1975, and nothing in title 17, United States Code, as amended by section 1 of this Act, shall be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before the effective date of this Act.

Approved October 15, 1971.

your affiant received information from Celeste Lorraine Aviles, Josephine Joy Friedland, and Howard S. Smith regarding the unauthorized reproduction of prerecorded 8-track stereo tapes. Josephine Jov Friedland states that she had been employed by Donald Koven, who operates a business under the names of Muntz Mobil Stereo Pak, Inc. and Sonar Distributors, located at 4930 Lankershim Boulevard, North Hollywood, California, from September, 1970 to the middle of February, 1971. Mrs. Friedland states that she was hired by Mr. Koven personally and told she would be reproducing and splicing prerecorded magnetic tapes. The supervisor of the operation at the above address is Xavier Pitassi, also known as Sam Pitassi. The various jobs performed by Mrs. Friedland included splicing of duplicated 8-track stereo tapes, labeling of 8-track stereo cartridges, operation of a Viking 225 duplicating machine, and the pulling of 8-track stereo tapes to fill invoices of Sonar Distributors and Muntz Mobil Stereo Pak, Inc.

Josephine Joy Friedland described in detail the activity carried on at 4930

Lankershim Boulevard, North Hollywood. She indicated that they made prerecorded stereo 8-track tape reproductions spliced together to form a continuous loop wound on a hub and encased in plastic cartridges approximately 5 1/4" x 4". These 8-track stereo tapes were reproductions of 8-track stereo tapes manufactured by most of the major recording companies. An authorized factory 8-track stereo tape, one manufactured by an authorized recording company, would be purchased from a retail outlet to be utilized as the master from which many unauthorized duplicates would be made. This factory 8-track stereo tape would be taken out of its cartridge and placed on a 7-inch reel which would in turn be placed on a Viking 225 tape deck play-back unit, five duplicates of the factory 8-track stereo tape would be made. The duplicating machine used is known as a Viking 225. After the duplicate copies of the 8-track stereo tape were recorded they would be taken off the recording machines and placed into one-half of the plastic cartridge. The tape is when spliced, creating a continuous loop, at which time the other half of

the plastic cartridge is secured to the half containing the prerecorded 8-track stereo magnetic tape. The label containing the name of the tape, title, artist and selections on the tape is then affixed to the cartridge. The cartridge is then placed in a jacket and the completed package is shrink wrapped by machine in cellophane; and placed on a shelf.

Mrs. Friedland indicates that from six to seven hundred cartridges a day are produced in this manner, and that the finished product is sold and shipped daily to persons all over the country.

Mrs. Friedland states that she has seen the following factory 8-track stereo tapes duplicated: Beatles on Capitol Records, Herb Albert and Joe Cocker on A&M Records, Simon and Garfunkel on Columbia Records, Three Dog Night and Steppenwolf on ABC-Dunhill Records. Mrs. Friedland states many others were duplicated but cannot recall their exact names.

Mr. Howard S. Smith, Attorney at Law and member of State Bar of California, stated to affiant that he knows that the

above named recordings are being produced without the authority of the named recording companies and artists. Mr. Smith, as an attorney, represents several different recording companies who's recordings are being reproduced without consent.

Attached to the affidavit will be an exhibit marked 4 showing an authorized 8-track stereo tape recording produced by Apple Records, Inc. and an unauthorized 8-track stereo tape marked Exhibit Three made by Mr. Donald Koven and sold and distributed by...Boulevard. They have black print on white paper.

Miss Aviles states she is in accord with those statements made by Mrs. Friedland and can add some additional information.

She witnessed, on numerous occasions, a factory 8-track stereo cartridge opened, the tape removed and wound on the Viking 225 master play-back machine. Miss Aviles explains that a factory tape is a cartridge which has the name of a record company, its logo, trademark, name of the album, artist and songs on it. Miss Aviles states that from this master duplicates were produced

as described by Mrs. Friedland.

Miss Aviles states she observed Donald Koven enter the location on numerous occasions with labels, blank tapes and cartridges.

Your affiant commenced the actual physical mechanics of preparing this affidavit and attached search warrant at 9:00 a.m. of March 2, 1971; and your affiant affixed his signature under oath to this affidavit before the undersigned magistrate at the time and date attested by said magistrate; the elapsed time reflected herein has been diligently utilized by your affiant in the mechanics of physically preparing these documents, locating and consulting with Deputy City Attorney David. L. Margulies, in reference to the aforementioned